

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

NATHANIEL MORRIS, JR.,

Plaintiff

v.

BAYHEALTH MEDICAL CENTER,

Defendant

:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION NO. 06-290 SLR

**RELAY BRIEF IN FURTHER SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Dated: November 9, 2007

STEVENS & LEE
Joseph Grey (No. 2358)
Thomas G. Whalen, Jr. (No. 4034)
1105 North Market Street, Seventh Floor
Wilmington, DE 19801
Tel: (302) 654-5180
Fax: (302) 654-5181
E-mail: jg@stevenslee.com
tgw@stevenslee.com

Kenneth D. Kleinman, Esquire
John F. Ward, Esquire
620 Freedom Business Center
Suite 200
P.O. Box 62330
King of Prussia, Pennsylvania 19406
(610) 205-6000

*Counsel for Defendant Bayhealth Medical
Center, Inc.*

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

III. CONCLUSION3

TABLE OF AUTHORITIES

CASES

Berkeley Inv. Group, Ltd v. Colkitt,
455 F.3d 195, 201 (2006)1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

NATHANIEL MORRIS, JR.,

Plaintiff

v.

BAYHEALTH MEDICAL CENTER,

Defendant

:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION NO. 06-290 SLR

**REPLY BRIEF IN FURTHER SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Bayhealth filed its Motion for Summary Judgment, Opening Brief and Appendix on July 2, 2007. Pursuant to the Joint Discovery Order approved by the Court in this case, Plaintiff’s Answering Brief was required to be filed on or before July 23, 2007. However, Plaintiff did not file an Answering Brief. Instead, on July 24, 2007, Plaintiff’s counsel filed a motion seeking an extension of the briefing schedule. Therein, Plaintiff’s counsel explained that, after reviewing Bayhealth’s Opening Brief, he felt that he was “no longer in a position to represent Plaintiff’s interests.” Pl. Motion for Extension of Briefing Schedule at 1. Plaintiff’s counsel further explained that he was requesting a continuance of the briefing schedule to afford him an opportunity to advise Plaintiff that he could no longer represent him in this action and to file a motion to withdraw. *Id.*

On July 26, 2007, the Court entered an Order granting Plaintiff an extension of ninety days in which to file an Answering Brief. Plaintiff’s Answering Brief was due to filed on or before October 22, 2007. However, Plaintiff has not filed an Answering Brief and Plaintiff’s counsel has not filed a motion to withdraw. During the extension period, the parties engaged in settlement discussions, which were unsuccessful. Based on discussions with Plaintiff’s counsel, Bayhealth

believes it extremely unlikely that this case will settle or that the Plaintiff will ever file an Answering Brief.

II. ARGUMENT

In deciding a motion for summary judgment, the Court's "job is to ascertain solely whether there is a dispute of material fact." *Berkeley Inv. Group, Ltd v. Colkitt*, 455 F.3d 195, 201 (2006). Although the party opposing summary judgment is entitled to "the benefit of all factual inferences in the court's consideration of a motion for summary judgment, the nonmoving party must point to some evidence in the record that creates a genuine issue of material fact." *Id.* "In this respect, summary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." *Id.*

The discovery period in this matter ended more than five months ago on June 1, 2007. Plaintiff has been – and remains – represented by an experienced and capable attorney. Although Plaintiff has had more than four months to file a response to Bayhealth's Motion for Summary Judgment, he has failed to do so. Plaintiff's failure to file an Answering Brief demonstrates that he simply cannot point to any evidence in the record that creates a genuine issue of material fact.

This turn of events is not surprising. Bayhealth's Opening Brief in support of its Motion for Summary Judgment relied heavily on the Plaintiff's deposition testimony. On pages 19 to 20, 22, and 23 to 24 of the Opening Brief, Plaintiff showed how the Plaintiff recanted key allegations of his Complaint and admitted he had no evidence to support critical elements of his legal claims. Having made these admissions under oath, the Plaintiff is now in no position to file an Answering Brief which changes his position yet again.

Since Plaintiff has failed to meet his burden of rebutting Bayhealth's Motion for Summary Judgment despite being granted more than ample time to do so, the Court should grant Bayhealth's motion and dismiss Plaintiff's claims.

III. CONCLUSION

For all of the above reasons, Defendant Bayhealth Medical Center, Inc. respectfully renews its request that the Court grant its Motion for Summary Judgment and enter judgment in its favor.

Dated: November 9, 2007

Respectfully submitted,

STEVENS & LEE, P.C.

/s/ Joseph Grey
JOSEPH GREY (DE Bar No. 2358)
1105 North Market Street, 7th Floor
Wilmington, Delaware 19801
(302) 654-5181

KENNETH D. KLEINMAN (PA No. 31770)
JOHN F. WARD (PA No. 81350)
STEVENS & LEE, P.C.
620 Freedom Business Center
Suite 200
P.O. Box 62330
King of Prussia, Pennsylvania 19406
(610) 205-6044

Counsel for Defendant
Bayhealth Medical Center, Inc.

CERTIFICATE OF SERVICE

I, Joseph Grey, hereby certify that on this 9th day of November, 2007, and in addition to the service provided pursuant to the Court's CM/ECF System, I caused copies of the foregoing Reply Brief to be served by first class United States mail, postage prepaid, upon counsel for Plaintiff, addressed as follows:

R. Stokes Nolte, Esquire
Nolte & Associates
1010 N. Bancroft Parkway, Suite 21
Wilmington, DE 19805

/s/ Joseph Grey
JOSEPH GREY